

***TOMARAS & OGAS, LLP***

10755-F SCRIPPS POWAY PARKWAY #281 • SAN DIEGO, CALIFORNIA 92131
TELEPHONE (858) 554-0550 • FACSIMILE (858) 777-5765 • WWW.MTOWLAW.COM

Kathryn A. Ogas
Brenda L. Tomaras

kogas@mtowlaw.com
tomaras@mtowlaw.com

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VIA FACSIMILE AND U.S. MAIL

REDACTED VERSION

Comments on the Potential Economic Impact of
Proposed Changes to Class II Gaming Regulations
National Indian Gaming Commission
1441 L Street, Suite 9100
Washington, DC 20005

Re: Comments on the Potential Economic Impact of Proposed Changes to Class II
Gaming Regulations

Dear Chairman Hogen:

These comments are being submitted on behalf of the Lytton Band of Pomo Indians (Tribe or Lytton) in regard to the Economic Impact Study of Proposed Changes to Class II Gaming Regulations prepared by Alan Meister for the National Indian Gaming Commission (Economic Impact Study). These comments are intended as a supplement to concerns raised by the Tribe regarding the NIGC's Proposed Rule, 25 CFR Part 502 and 546, Classification Standards, Class II Gaming, Bingo, Lotto et al. (Classification Standards) at its meetings with the NIGC, the public hearing, and in its previous comment letters.

As a general matter, the Tribe agrees with Mr. Meister's analysis and conclusions in the Economic Impact Study. Although it is difficult to precisely quantify the short and long-term effects of the proposed Classification Standards, like Mr. Meister, the Tribe strongly believes that the Classification Standards will produce significant, and potentially devastating, negative effects on Class II gaming and the Tribe in particular.¹

As Mr. Meister points out, the magnitude of the negative impact of the Classification Standards will vary widely from tribe to tribe. For Lytton, the magnitude of the negative impact will be enormous because Lytton has no viable alternative to Class II gaming. In the short-term,

¹ The Tribe believes that the NIGC's proposed Technical Standards for Electronic, Computer, or Other Technologic Aids used in the Play of Class II Games, 71 Fed. Reg. 46336 (Technical Standards) will also have a significant and cumulative negative economic impact. It should be noted that these comments do not reflect this additional impact since the Economic Impact Study does not include an analysis of the potential impact of the Technical Standards. In light of the additional economic impact that will occur if the Technical Standards are adopted, the Tribe believes that the NIGC must complete such a study before it can adopt any Technical Standards.

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the economic impact would be a significant decrease in revenue, increased capital expenditures and costs, and potential temporary closure. Long-term, the Tribe may have to permanently shutdown its Casino if the loss of revenue becomes too great, which, of course, would result in a total loss of income.

The NIGC cannot deny the profound impacts to tribes such as Lytton that are authorized to engage only in Class II gaming that will occur if the Classification Standards are passed as currently drafted.

For these reasons, the Tribe feels that it is imperative that the NIGC consider Mr. Meister's findings as they pertain particularly to Lytton and therefore feels it necessary to supplement Mr. Meister's Economic Impact Study with these comments.

THE NEGATIVE IMPACTS WILL BE NUMEROUS AND SIGNIFICANT

The Tribe agrees with Mr. Meister that the Classification Standards will produce numerous negative economic impacts including (i) a decrease in gaming revenue (with a resulting decrease in tribal revenue), (ii) a decrease in jobs, (iii) a decrease in the variety and quality of Class II electronic bingo games, (iii) temporary closures of gaming facilities, (iv) an increase in capital expenditures and costs, and (v) a decrease in leverage that tribes would have in the negotiation of Class III gaming compacts, as well as numerous other negative effects outlined by Mr. Meister. In addition, the Tribe believes that the Classification Standards will decrease Lytton's ability to attract patrons, may reduce or eliminate the availability of electronic bingo games, and may result in the permanent closure of Lytton's gaming facility.

While the Tribe believes that each of these potential negative impacts is significant on its own, it is the cumulative impact of all of these effects, which must be considered.²

DECREASE IN GAMING REVENUE

(Resulting in an obvious decrease in tribal revenue)

The Tribe will experience a substantial decrease in gaming revenue if the Classification Standards are adopted. As noted by Mr. Meister, the loss of revenue will be significant for Tribes, such as Lytton, who do not have a viable alternative to Class II bingo devices. While overall, Class II gaming provides eleven percent (11%) of total Indian gaming revenue, in Lytton's case, Class II revenue represents eighty-three percent (83%) of its total gaming revenue. Thus, a reduction in Class II gaming revenue represents a significant loss for Lytton, which cannot be replaced through alternative sources.

If the Classification Standards are adopted as currently written, all of the Tribe's currently acceptable electronic bingo games would be prohibited. Because the Tribe cannot get a compact with the State of California it would only have two options -- adopt compliant machines

² The potential economic impact exceeds one hundred million dollars. Thus, the NIGC must reclassify this as a "significant regulatory action" under the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*, and, among other things, conduct the required cost/benefit analysis.

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or shutdown its Casino. Thus, the best-case scenario for the Tribe is the replacement of all of its current electronic player stations and systems with games that are much slower, more cumbersome, and less diverse.

Loss of Revenue Resulting from Slower Bingo Devices

Game revenue is directly related to the number of games that can be played within a set period of time. Obviously, the slower the device, the fewer games that can be played. The fewer games played, the fewer dollars generated. Electronic bingo devices under the Classification Standards will be much slower than the current devices operated by Lytton. Thus, this factor alone will result in a substantial decrease in gaming revenue.

Mr. Meister estimates that the expected revenue per bingo device per day under the Classification Standards would be fifty-seven percent (57%) lower. Over the last twelve (12) months, the average win per unit at Casino San Pablo is \$____, this translates into _____ in revenue over the last twelve (12) months. Using Mr. Meister's estimate, games under the Classification Standards would result in a decrease in the average win per unit of \$____ to \$____ with the resulting loss of income for one year in the amount of \$____.³

The Tribe has been informed that the loss of revenue resulting from slower games could be as much as sixty-six percent (66%). Using this estimate, the average win per unit would be reduced by \$____ to \$____ with the resulting loss of income for one year in the amount of \$_____.

Loss of Revenue Resulting from Decrease in Patronage

As is demonstrated above, the decrease in speed of an acceptable electronic bingo game under the Classification Standards will result in a significant loss of revenue in and of itself. The analysis, however, cannot stop there. The potential for loss must also take into consideration the potential loss of patronage that will likely result from a decrease in consumer demand.

The only allowable replacement devices under the proposed Classification Standards would be exceedingly slow, less aesthetically pleasing, less enjoyable, and thus, far less appealing to patrons causing a negative effect on player satisfaction. Such dissatisfaction is likely to result in patrons spending less time and money at the Casino. Indeed, it is likely that some patrons will simply stop coming to the Tribe's Casino. It goes without saying that such decreases will result in a loss of revenue. While it is difficult to quantify the precise loss of patronage before the fact, the Tribe estimates that the loss will be significant.

³ Although Mr. Meister calculated an average fifty-seven percent (57%) decrease, he also referenced variable decreases arrived at by BMM North America, Inc. through various simulations. The BMM simulation analysis estimated a decrease of thirty-seven (37) to forty-three (43) percent. While the Tribe believes that such figures significantly underestimate the potential loss, even assuming these lower percentages, the loss of revenue is substantial. Under the 43% calculation, average win per unit would be reduced by \$_____, with a decrease in yearly revenue of \$_____. Under the 37% calculation average win per unit would be reduced by \$_____, with a decrease in yearly revenue of \$_____.

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INCREASED CAPITAL EXPENDITURES AND COSTS

The Tribe agrees with Mr. Meister's conclusions that Tribes will incur numerous increased costs if the Classification Standards are enacted. The Tribe believes such costs will be substantial.

Class II game systems are much more complex than stand alone gaming machines. The games proposed by the NIGC are a completely new creation. Thus, development of new systems will not only require extensive modification to the electronic player stations, but will also require extensive modification/development of the underlying platform. Development of new platforms is just the first step of the process. Once the development process is complete, testing must be accomplished followed by the actual manufacture of new games systems. For these reasons, development of a Class II game system that will accommodate the restrictions imposed by the Classification Standards will require massive capital expenditures. While the initial costs of redesign and manufacture will be most likely be borne by the manufacturers, such costs will eventually be passed on to the Tribes through higher purchase prices and increased participation fees.

In addition, as Mr. Meister points out, the Tribe will incur additional capital costs associated with replacing its entire stock of electronic player stations and game systems, including switching costs, regulatory costs, and retraining costs.

The decrease in revenue due to slower games and loss of patronage combined with increased capital expenditures and other costs will have a significant cumulative effect on the Tribe's ability to maintain a profitable gaming operation.

DECREASE IN JOBS

Mr. Meister briefly discusses the potential loss of jobs for tribal members. The Tribe believes that Mr. Meister's analysis comes up short with regard to the potential loss of employment. While it is important to note the loss of potential tribal member jobs, the Tribe believes it is also important to note the significant amount of jobs that could be lost period and the resulting effect such loss will have on the Tribe and the local community.

At the very least, Lytton anticipates that the Classification Standards will result in a decrease in patronage. Fewer customers, means fewer employees. The Tribe also believes that there is a possibility that it will have to reduce the number of games it operates due to decreases in its customer-based and/or availability of game systems. Thus, at best, Lytton anticipates that it will be forced to layoff some of its employees. Any decrease in the ability to provide employment represents an unwanted loss. Such is particularly true, when as here, the local area suffers from impoverishment.

As discussed in detail below, Lytton further believes that the Classification Standards may result in the temporary or permanent closure of its Casino. Obviously, if such occurred, the Tribe would be forced to layoff all of its employees. As pointed out previously, the Casino provides approximately 500 jobs to the local community. The loss of jobs, even if only

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temporary would result in a huge loss to the local community. Moreover, temporary layoffs would negatively impact the Tribe in that it would likely lose experienced staff and key employees and would undergo considerable costs to recruit and train new employees.

DECREASE IN VARIETY, QUALITY AND AVAILABILITY OF GAMES

Variety and Quality

The Economic Impact Study points out that the Classification Standards may cause many manufacturers to leave the market resulting in a decrease in competition, which in turn will lead to a decrease in the variety and/or quality of Class II devices. While the Tribe agrees with Mr. Meister's observation, it must also point out that, even without a decrease in potential suppliers, the types of games that the Tribe will be able to offer will be limited by the Classification Standards themselves. For example, the provisions of the Classification Standards which require that (i) all players must have an equal chance of obtaining the same set of winning patterns and (ii) the probability of achieving any particular winning pattern may not vary based on the amount wagered by the player will severely limit variety in terms of game themes, payback percentages, and prize amounts.

The ability to offer varying game themes is critical to the success of the Tribe's casino given that it is permitted to offer only Class II games. The Tribe must have the flexibility to offer its patrons choice to ensure that each player is able to find a player station that satisfies that player's comfort and enjoyment needs. To provide its patrons with this excitement and entertainment, the Tribe must have the flexibility to operate electronic player stations that offer varying game themes, denominations, and payback percentages. Under the proposed Classification Standards, the Tribe would no longer be able to offer this variety.

Availability

In addition to decreasing the variety and quality of games, enactment of the Classification Standards may very well limit the availability of new machines. There are currently no existing Class II game systems that satisfy the criteria of the Classification Standards. Thus, manufacturers will have to redesign, manufacture, certify and implement new games, which will take a considerable amount of time, particularly given the enormous number of Class II devices, which would have to be replaced. In addition, it is likely that many manufacturers will leave the market, which will substantially increase the likelihood that the supply of new games will be extremely low. If this should occur, the Tribe would have no choice but to reduce the number of machines in its facility which will decrease the Tribe's gaming revenue and employment capabilities even further. Compounding this problem is the possibility that a decrease in availability will likely lead to higher purchase prices and participation fees. Finally, there is a possibility that the manufacturers may leave the market completely. All of the major manufacturers have stated that because of the high costs, questionable viability of systems, and the legal uncertainty created by the certification process, it is likely that they will pull out of the Class II market altogether. Indeed, these manufacturers believe that no legitimate manufacturer will accept the risk, investment and uncertainty required to continue in the Class II market.

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Obviously, if this occurs, the Tribe will be faced with either no supply or a tenuous and questionable supply of game systems.

TEMPORARY/PERMANENT CLOSURE OF CASINO

Temporary Closure

The Economic Impact Study states that manufacturers are estimating that it could take more than one (1) year and up to two (2) years to redesign, manufacture, certify and implement games that conform to the Classification Standards. The Tribe has been informed by its current supplier that developing new game systems would take at least eighteen (18) to twenty-four (24) months, assuming the certification process proceeds efficiently and backlogs are not too lengthy. This timeframe is just to develop and certify the underlying bingo platform. Once the bingo platform is built, manufacturers will need to develop a variety of game themes. Each individual game theme would likely take one (1) year to create, develop, and successfully test. Thus, the entire process from development to actual physical replacement of games will likely take a minimum of three (3) years. The Tribe believes that, in actuality, the time period will be much longer since it is highly likely that a backlog in each area will occur given the enormous amount of Class II games that will have to be redesigned and replaced.

Under the Classification Standards, Tribes are given only six (6) months to install compliant games. While the Classification Standards provide for extensions of this deadline for good cause, there is absolutely no guarantee that the NIGC will do this. As the NIGC is aware, none of the current 1,020 electronic player stations and bingo systems at the Tribe's Casino will be permissible under the Classification Standards and will have to be replaced with entirely new game systems and electronic player stations. As such, there is a potential that the Tribe will be forced to temporarily shutdown its gaming operations which will result in a total loss of gaming revenue, loss of jobs, and loss of patrons. In addition, the Tribe will face significant capital expenditure to re-open (employee recruiting and training costs, marketing to regain lost patrons, costs associated with re-stocking the facility, etc.).

Permanent Closure

As Mr. Meister notes, there is also a potential that some Tribes will be forced to shutdown their operations permanently because the loss of revenue may become too great. This possibility is very much a potential reality for Lytton given that its gaming operation is entirely dependent on Class II gaming.

As discussed above, the loss of revenue as a result of slower machines, loss of patronage combined with an increase in capital costs will have a significant negative economic impact on Lytton. As with all business operations, the Tribe has debts and other financial obligations that it must take care of before it can use its revenues to assist tribal members and the local community. Thus while it may appear that even with the significant decrease in revenue, the Tribe will still enjoy sufficient revenue, it is quite possible that a substantial decrease in income and increase in costs will render the Tribe's Casino unprofitable.

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In addition, the Tribe has been advised that it may not be possible to develop and manufacture a bingo game that meets the requirements of the Classification Standards.

Finally, as noted above, many manufacturers have indicated that the Classification Standards may cause them to leave the Class II market. Indeed, at least one manufacturer has unequivocally stated that it would not continue making Class II machines if the Classification Standards are enacted. If this should occur, the Tribe's ability to obtain bingo games may be non-existent. Since the Tribe has no viable alternative to Class II gaming, this could force the Tribe to shutdown its facility permanently resulting in a total loss of revenue to the Tribe and lost jobs and financial aid to the City of San Pablo.

At worst, the Tribe would have to completely shutdown its gaming operation resulting in total loss of revenue to the Tribe, its members, and the local community as well as the loss of 500 jobs. Obviously, such results would have a devastating negative economic impact on the Tribe and the surrounding community.

As noted in its previous comments, the Tribe, through its Casino, has been able to institute programs to benefit its tribal members and help raise them out of the poverty and unemployment that they have faced throughout their lifetimes. In addition to providing the Tribe with a means to improve the lives of its tribal members, the Casino also provides the Tribe with the financial resources to assist the City of San Pablo and its citizens and provides 500 much needed jobs.

CONCLUSION

In light of the substantial costs associated with the design, development and manufacture of new game systems, the anticipated severe decrease in revenues, the questionable commercial viability of the games, and the potential loss of suppliers, it is the Tribe's belief that adoption of the Classification Standards may be fatal to its Class II gaming operations.

For these reasons, the Tribe urges the NIGC to seriously consider Mr. Meister's findings, these comments, and the comments submitted by other tribes and manufacturers and once again requests that the NIGC withdraw its proposed Classification Standards.

Sincerely,



Kathryn A. Ogas
Attorney for the Lytton Band of
Pomo Indians

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**TOMARAS & OGAS, LLP**

10755-F SCRIPPS POWAY PARKWAY #281 • SAN DIEGO, CALIFORNIA 92131
TELEPHONE (858) 554-0550 • FACSIMILE (858) 777-5765 • WWW.MTOWLAW.COM

Kathryn A. Ogas

Brenda L. Tomaras

FAX TRANSMITTAL SHEET**RECIPIENT INFORMATION****Please Deliver To:** Comments on Class II Economic Impact Study**Recipient Fax:** (202) 632-7066**Recipient Phone:** (202) 632-7003**SENDER INFORMATION****Name:** Kathryn A. Ogas**Email:** kogas@mtowlaw.com**Sender's Direct Fax:** (858) 777-5765**Sender's Direct Phone:** (858) 554-0550**GENERAL INFORMATION****Date/Time:** Dec. 15, 2006 (1:00 p.m. PST)**Pages (Includes Cover):** 15 16**Special Instructions:** ☒ URGENT☐ Please Reply☐ For Your Information

Message: Enclosed please find two versions of the Lytton Band of Pomo Indians' Comments on the Potential Economic Impact of Proposed Changes to Class II Gaming Regulations.

Please note that the Tribe is providing two versions of its comment letter. One version has been redacted as the Tribe's comments contain privileged and confidential financial information. The Tribe requests that only the redacted version be made public. If there is a problem with this, please contact me at the above number.

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